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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

DONALD SAUCIER,

Petitioner,

v.

ELLIOT M. KATZ and
IN DEFENSE OF ANIMALS

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS and NATIONAL LAW ENFORCEMENT OFFICERS' RIGHTS CENTER, IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a case alleging the use of constitutionally excessive force, the test for qualified immunity and the reasonableness test under the Fourth Amendment are identical, such that a finding of unreasonable force under the Fourth Amendment necessarily precludes the officer from being entitled to qualified immunity.

2. Whether the court of appeals erred in concluding, based on the facts known to it "at this stage of the case," that petitioner's use of force in arresting respondent, which consisted of carrying respondent from the crowd to a waiting van and pushing him inside, without injuring him or placing him in any pain, so clearly exceeded the amount of force permitted by the Fourth Amendment as to warrant denial of qualified immunity.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Police Organizations, Inc. (hereafter "NAPO") and its affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, submits this brief in support of Petitioner, Donald Saucier, a military police officer with the United States Army at the time of the incident.[1] NAPO seeks to reverse the judgment of the Ninth Circuit Court of Appeals, denying the Petitioner's motion for summary judgment on qualified immunity.

NAPO is a national non-profit organization, representing law enforcement officers throughout the United States. It is a coalition of police associations and unions that serves to advance the interests and legal rights of officers through advocacy, legislation, and education, representing 4,000 law enforcement organizations with over 228,000 sworn law enforcement officers (including police officers, deputy sheriffs, state troopers or highway patrol officers, and some federal agents) and 11,000 retired officers. NAPO's affiliate, the National Law Enforcement Officers' Rights Center, advocates the fundamental due process and workplace rights of officers.

NAPO's members have a significant interest in the important issues of law before this Court. The Court's decision will directly impact law enforcement officers employed by all levels of government. If the lower court's decision in this case is not reversed, officers will become more reluctant to use any force in performing their duties, even if such force appears necessary and lawful to make an arrest or to restrain or remove a suspect. This is because officers will justifiably fear that the use of any force could very well subject them to protracted litigation.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of the brief. In addition, both the Petitioner and the Respondent have consented to this brief, and copies of the consents have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

Basic legal research reveals an ever increasing number of lawsuits against law enforcement officers; the number of recent appellate decisions in § 1983 cases continues to grow and will become staggering. It is no secret that a 'cottage industry' of attorneys has developed to sue police officers. This 'industry's' primary purpose is to find clients with a grievance against the police because of alleged mistreatment and then to bring a lawsuit alleging constitutional violations for the purpose of winning a substantial sum.[2] While that phenomenon is obviously the American way and while some cases may indeed merit a finding of liability and monetary damages, it is no secret that the goal in filing many of the cases is to obtain a significant pre-trial settlement, which state or local governments are often willing to make for financial or publicity reasons.[3] Affirming the Ninth Circuit's decision in this case would provide an added incentive to file more lawsuits against officers and their agencies, subjecting them to lengthy discovery and trials.

There is a context for this fear. Officers have been increasingly under siege by management in some departments, which have been increasingly willing to promote officers who are more aggressive in solving crimes or preventing crime–at times without providing for adequate training on the use of force–or, on the other hand, to take personnel or even disciplinary actions against officers if they are not viewed as being sufficiently aggressive in cracking down on crime. In addition, officers routinely fear for their continued careers, their physical and emotional health and that of their families, and even sometimes their financial solvency (if not fully indemnified and there is the

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[2] Some of these attorneys are well-known and tend to turn up soon after a highly visible incident where a suspect has been injured or killed. A few are experts, who have written treatises on the subject, who commercially report cases on police misconduct, or who make oral presentations, including running seminars on the subject. Some of these attorneys can be identified through an Internet search. In fact, a Chicago attorney has written a "how to" plead and litigate police misconduct cases, placing this information on his web site.

[3] Often, a municipal or county government does not have the resources to fully litigate and then risk losing a significant judgment, which it would be hard-pressed to pay. Or it wants to put a highly-publicized incident, perhaps with racial overtones, to rest, notwithstanding a strong defense.

possibility of punitive damages) when named as defendants in lawsuits alleging constitutional violations. It is no wonder that police departments are having difficulty recruiting officers, with poor morale being the biggest obstacle to retaining current officers and a major factor in recruiting new ones.[4]

Amicus curiae welcomes this opportunity for the U.S. Supreme Court to clarify an important doctrine, which has been unjustifiably constricted by the Ninth Circuit and by several other circuits. The Court's resolution of this case will determine, first, whether qualified immunity for officers and other public employees remains a viable doctrine serving important public policies and, second, whether the courts should routinely deny summary judgment for the officer and reject qualified immunity for an officer who used absolutely minimal force in making an arrest resulting in no injury, as a matter of law, in disregard of the principles established by this Court's prior decisions.

SUMMARY STATEMENT OF THE CASE

The *amicus curiae* adopts and relies upon the factual statement in the June 8, 2000 Petition for a writ of certiorari, filed in this appeal by the Solicitor General of the United States. What follows is a shorter narrative of that statement.

Respondent Katz's Fourth Amendment excessive force claim arose out of his arrest at the Presidio military post in San Francisco, during a September 1994 event held to celebrate conversion of the Presidio to a National Park, during which senior officials spoke. Although display of political banners on military bases is prohibited, Katz stood up during Vice President Gore's speech, walked to a barrier separating these officials from the audience, and then unfurled a large banner, which read: "Please Keep Animal Torture Out of Our National Parks", a protest against alleged animal experimentation at the Army's hospital located within the Presidio.

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[4] *See* Robert T. Scully, Letter to the Editor, *Cop shortage is no surprise*, USA Today, Dec. 1, 2000, at 27A.

Just after unfurling the banner, Petitioner Donald Saucier and Sergeant Steven Parker, both military policemen, approached Katz quickly. These officers each took one of Respondent's arms and quickly removed him from the seating area. According to Katz (during discovery), they "started sort of picking me up and kind of walking me out, kind of like very hurriedly." Respondent claims that he was then "shoved" into a military police van located nearby. While Respondent claims that he nearly fell headlong into the van and was almost injured, he admits that he was not injured, because he caught himself in time. After a brief detention at a military police station, Respondent was released. Respondent's arrest was broadcast, and a videotape of the relevant portion was submitted to the district court. Viewed in a light most favorable to Katz, the videotape confirms the Katz's removal and his movement towards the van.

Respondent brought this action against Petitioner and other officials under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that the officers used unconstitutionally excessive force to arrest him[5] In denying the Petitioner's motion for summary judgment, the district court ruled that there were disputed questions of fact relevant to the constitutional claim and the qualified immunity defense. The district court held,"[T]he qualified immunity inquiry is the same as the inquiry made on the merits."[6] The Ninth Circuit affirmed. *Katz v. United States, et al.*, 194 F.3d 962 (1999). It held that the reasonableness standard to determine the merits of Katz's excessive force claim was identical to the reasonableness test for the officer's qualified immunity defense, thereby precluding summary judgment on that issue. In addition, in response to Petitioner's argument that the "amount of force he used in arresting Katz was so minimal that it was per se reasonable" to grant him qualified immunity, the Ninth Circuit

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[5] The outcome of this case, while brought under Bivens, will also directly affect lawsuits brought under 42 U.S.C. § 1983 against state, municipal, and county law enforcement officers, because the defense of qualified immunity may be invoked, irrespective of the jurisdictional basis. *See Butz v. Economou*, 438 U.S. 478, 504 (1978).

[6] Petition for a writ of cert., *Saucier v. Katz et al.* at 30a.

also ruled that, "taking the facts as asserted by Katz in the light most favorable to him, no reasonable officer could have believed that the amount of force used was lawful." *Id.* at 968-70.

SUMMARY OF THE ARGUMENT

Qualified immunity protects law enforcement officers and other public officials from the expense and vexation of protracted litigation, possible damages, and from the chilling effect that potential litigation has upon the exercise of their responsibilities. Officers are routinely placed in situations where they may be called upon to use some force, from the minimal force used in this case to effect an arrest, to deadly force during dangerous situations where officers must draw their guns and prepare to use them in self-defense or the defense of others. The fear of personal liability can seriously erode this necessary confidence and willingness to act. An officer's hesitation to use force for fear of being sued endangers not only his or her life, but the lives of other citizens, and would allow public disturbances to escalate, as could have happened here. In diligently pursuing their duties in good faith, officers should not have to fear harassing litigation or paying potential monetary damages, whenever they use any force which they reasonably believe to be lawful under the Fourth Amendment, even minimal force. Qualified immunity is a governmental policy which serves this public interest.

The Ninth's Circuit's decision violates this Court's holding in *Anderson v. Creighton*, *infra*, and is unsupported in law. The "objective reasonableness" component of the judicial inquiry as to the lawfulness of an officer's conduct under the Fourth Amendment, is not the same as the objective "reasonableness-of-officer's-belief" component of the inquiry as to the officer's qualified immunity. The use of the word 'reasonable' or 'reasonableness' does not convert the qualified immunity and liability standards into an identical one. Combining the two separate "reasonableness" standards into one inquiry cases place the question of immunity in the hands of the jury in the vast majority of excessive force cases where there is some material factual dispute, no matter how minor or how irrelevant that that dispute is to the determination of qualified immunity—the

situation in this case. Thus, qualified immunity would no longer be available as a defense in most excessive force cases and the determination thereon will depend on and probably parallel the determination of liability after a trial.

Therefore, a law enforcement officer, who may have violated or did violate the plaintiff's constitutional rights by using excessive force, would no longer be entitled to qualified immunity, even if the officer reasonably believed his or her actions were lawful and justified, even if mistaken. As a consequence, qualified immunity would rarely be applicable in many or most excessive force cases but would instead become a futile and unavailing doctrine. By effectively precluding findings of qualified immunity, especially through summary judgment, in all but the most obviously frivolous cases, the Ninth's Circuit's decision circumvents and thwarts the important public interests served by qualified immunity

Here, qualified immunity would entitle the Petitioner to summary judgment if, in light of clearly established principles governing the use of force, he or other military police officers could have reasonably believed that his specific actions in arresting the Respondent, quickly removing him from the ceremony, and placing him in a van out of sight, were lawful, in light of the information possessed by the Petitioner at the time. In this case, failing to quickly remove the Respondent could have further disrupted the Presidio ceremony and encouraged others to register protests, as well as possibly increasing a security risk to the Vice President and other officials on podium.

In addition, the Eleventh, Fifth, Second, Fifth, Eight, and Eleventh Circuits apply the principle of de minimis or minimal use of force and grant qualified immunity to the defendant officers whenever the force used by a law enforcement officer was minimal (often irrespective of the issue of liability) and the injuries were minor or non-existent. Taking the Respondent's allegations as true in the instant case, the force involved in removing the Respondent and in placing him in the van was nominal and minimal, as supported by a lack of any injury. Also, the force used was of the type that police officers could reasonably

expect to use to remove an individual quickly from a crowd to prevent a public disturbance.

Under the minimal-use-of force standards established by the Second and Eleventh Circuits, qualified immunity should have been granted for the Petitioner by way of summary judgment. *First*, the circumstances would not 'inevitably lead' a reasonable officer in the Petitioner's position to conclude that the force used on the Respondent was unlawful, the Eleventh Circuit's test. *Second,* no rational jury could have found that the force used by Petitioner was so excessive that no reasonable officer would have made the same choice, the Second Circuit's standard.

ARGUMENT

I. The principle of qualified immunity serves important public policies when a law enforcement officer is sued for damages for alleged excessive use of force. The decision by the court of appeals equates immunity with liability, severely constrains the application of qualified immunity, and thus effectively constricts it so much that the immunity will rarely be available as a viable defense in excessive force cases. Therefore, the decision seriously undermines the public interest, with consequences for public safety.

This Court has repeatedly upheld the principle of qualified immunity for law enforcement officers and others officials and has affirmed the important public interests which the doctrine serves, including the resolution of this issue before trial, if at all possible. By effectively precluding qualified immunity in all but the most obviously frivolous cases, the circuit court's decision circumvents the important public policies served by qualified immunity.

A. The decision below effectively precludes the availability of qualified immunity in most excessive force cases against law enforce officers has potentially serious consequences for public safety. The ruling below places officers at risk of undue interference in the performance of their

duties through having to defend increasing numbers of lawsuits and potentially disabling liability. It also directly impacts public safety, as officers become reluctant to use any force while restraining, arresting, or frisking an individual, for fear of being sued for any force that they use.

I

This Court has consistently held that "government officials are entitled to some form of immunity from suits for damages" in order to protect them from "undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald,* 457 U.S. 800, 806 (1982). Perhaps the best exposition on this public policy is *Forrester v. White*, 484 U.S. 219 (1988):

> By its very nature, however, the threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties. In many contexts, government officials are expected to make decisions that ... above all are informed by considerations other than the personal interests of the decisionmaker. Because government officials are engaged ...in governing, their decisions will often have adverse effects on other persons. When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. In this way, exposing government officials to the same legal hazards faced by other citizens may detract from the rule of law instead of contributing to it.

Id. at 223.[7] *Harlow* addressed the social costs involved:

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[7] *See Scheuer v. Rhodes*, 416 U.S. 232 (1974) where the Court emphasized that public officials, including the police, "who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. ... [I]t is better to risk

> [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. (footnote omitted) These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the ... discharge of their duties.

457 U.S. at 814 (citing *Gregoire v. Biddle*, 177 F.2d 579, cert. denied, 339 U.S. 949, 70 S.Ct. 803 (1950)). *See Anderson v. Creighton*, 483 U.S. 635 (1987) and *Davis v. Scherer*, 468 U.S. 183, 196 (1989).[8]

II

Two subsequent Supreme Court cases explain how qualified immunity serves the public purpose. *Mitchell v. Forsyth*, 472 U.S. 511 (1985), discussed the importance of resolving the issue of immunity before trial, if at all possible. The Court emphasized the distinct differences between the issues of immunity and liability:

> Harlow thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question ... . The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. ...
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> ...
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> Similarly, it follows from the recognition that

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some error and possible injury from such error than not to decide or act at all. *Id.* at 241-242.

[8] "The fear associated with allowing damages suits against government officials entails substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." 483 U.S. at 638."

> qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated.

Ibid. at 526 and 527-28. *Harlowe* emphasized that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." 457 U.S. at 818. Subsequently, in *Siegert v. Gilley*, 111 S.Ct. 1789 (1991), this Court elaborated:

> Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits. One of the purposes of immunity, ... is to spare a defendant not only unwarranted liability, but unwarranted demands customarily placed upon those defending a long drawn out lawsuit.

Id. at 1793.

Shortly thereafter, in *Hunter v. Bryant*, 502 U.S. 224, 228 (1991), the Court reversed the Ninth Circuit, because, "[its decision] routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. (citation omitted)." In the instant case, the consequence of the Ninth Circuit's decision to combine the two separate "reasonableness" standards into one inquiry will be the same as in *Hunter*, to once again place the question of immunity in the hands of the jury in the vast majority of cases where there is some material factual dispute, no matter how minor or how irrelevant that that dispute is to the determination of qualified immunity—the situation in this case.

III

Police officers need to be able to respond quickly and effectively when arresting, restraining, or using other force on a

suspect. Qualified immunity serves that public interest most directly by allowing police officers to do their job, permitting them some flexibility on the degree and range of physical force utilized in response to enforcing the law, including responses to unlawful public disturbances or inherent or perceived danger. As *Anderson* states, "Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law." 483 U.S. at 644. Qualified immunity facilitates this process and promotes effective law enforcement. As the Chief of the FBI Academy's Legal Instruction Unit has written:

> Law enforcement officers face many stressful situations inherent in their profession, including the threat of being sued ... because of their actions. Since officers are often placed in fast-breaking situations, they must decide whether to arrest or search with little opportunity to obtain prior legal advice. By its very nature, law enforcement inevitably places officers in situations where they must make difficult judgments, balancing the extent of the authority they exercise with the constitutional rights of the citizens they serve. ... [L]aw enforcement effectiveness often depends on officers' confidence and willingness to act swiftly and decisively to combat crime and protect the public.
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> However, the fear of personal liability can seriously erode this necessary confidence and willingness to act. Even worse, law enforcement officers who have an unrealistic or exaggerated fear of personal liability may become overly timid or indecisive and fail to arrest or search to the detriment of the public's interest in effective and aggressive law enforcement. ...
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> ...
>
> An officer's discretionary decision to arrest or search inevitably increases the risk of a subsequent lawsuit. ... The qualified immunity defense does not excuse clearly unconstitutional or offensive police

> misconduct. It does, however, offer generous protection to conscientious officers who make objectively reasonable mistakes. The availability of a qualified immunity defense should be encouragement to responsible officers that they can perform their vital law enforcement functions with a constant fear of personal liability.

Daniel L. Schofield, *Personal Liability—The Qualified Immunity Defense*, FBI LAW ENFORCEMENT BULLETIN, March 1990 (Internet version contains no page numbers).

If an officer is fearful of lawsuits and liability and, as a result, reluctant to use the reasonable force believed by the officer to be lawfully necessary to arrest an individual for which there is probable cause, or even to apprehend an armed suspect, then the officer's hesitation endangers public safety. This reluctance not only increases the risk that an suspect may try to flee or not cooperate during an arrest, but also places the officer and the lives of nearby persons in potentially serious jeopardy especially when a suspect is armed and dangerous. In this case, failing to quickly remove the Respondent could have further disrupted the Presidio ceremony and encouraged others to register protests, as well as possibly increasing a security risk to the Vice President and other notables. Unfortunately, the Ninth Circuit panel in this case has treated lightly, if at all, the potential consequences of constricting the doctrine of qualified immunity.

While the instant case involves minimal force, *amicus curiae* respectfully asks the Supreme Court to remain cognizant that its holding will also affect the application of qualified immunity to officer use of deadly force in cases where the stakes are obviously much greater. The consequences could be deadly for an officer and bystanders if an officer believes that only a lesser use of force, than would normally be applied, will pass constitutional muster. The U.S. Constitution does not require that police officers use "a minimum of violence when attempting to stop a suspect from using deadly force against police officers or others." *O'Neal v. DeKalb County*, 667 F. Supp. 853, 858 (N.D. Ga. 1987). To do so would "expose police officers to unnecessary

risks." *Id.* The greater risk of injury or death which could emanate from a recognition that qualified immunity would not be available to officers in most excessive force cases, as could well occur if the Ninth Circuit's judgment is affirmed, is an unacceptable to law enforcement officers and their families.

Let there be no misunderstanding about it, significantly reducing the availability of qualified immunity before trial will place officers in varying degrees of greater jeopardy and will serve as a deterrent to some necessary use of force. It will thus increasingly expose police officers to unnecessary risks. As this Court stated in *Terry v. Ohio*, 392 U.S. 1, 23-24 (1968):

> [I]t would be unreasonable to require that police officers take unnecessary risks in the performance of their duties ... every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives .... In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves ... .

Therefore, in order to protect society against these dangers and costs, this Court has generally provided government officials with a "qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson,* 483 U.S. at 638. It is clearly in the interest of all law-abiding citizens and residents of this nation that law enforcement officers possess the necessary latitude and discretion to perform their job effectively without the constant fear of lawsuits. Here, such immunity entitles the Petitioner to summary judgment if, in light of clearly established principles governing the use of force, he could, as a matter of law, have reasonably believed that his specific actions in arresting the Respondent, removing him, and placing him in a van, were lawful. *Id.* at 641.

B. The Ninth Circuit's ruling would make the determination of qualified immunity in excessive

force cases rest on the jury's or judge's eventual decision on the issue of liability in lawsuits alleging unconstitutionally excessive use of force, thus combining these two issues. This combination creates a major exception for the application of qualified immunity in many, if not all, excessive force lawsuits against law enforcement officers. Such an exception for excessive force cases negates and defeats one of the important policy reasons underpinning qualified immunity, an entitlement not to stand trial and a defense against lawsuit and contradicts *Anderson's* expressed rejection of such exceptions.

Excessive force cases are often different than many other types of § 1983 or *Bivens*' actions seeking damages for violations of an individual's constitutional rights. For example, unless the law was clearly established on the use of a certain type of a physical restraint instrument or device at the time of an arrest or seizure, (*see, e.g., Wagner v. Bay City, Texas*, 2000 WL 1285264 (5th Cir. September 27, 2000)), many excessive force cases are admittedly fact-intensive on the issue of liability, requiring a trial when the facts are disputed at the pre-trial stage and not readily subject to summary judgment or dismissal on the merits.

It does not follow, however, that the determination of qualified immunity before trial should likewise be necessarily postponed in many, if not most, excessive force cases. This is because the existence of a material dispute on one or more facts preventing summary judgment for the officer on the issue of liability does not necessarily mean that qualified immunity cannot be resolved by summary judgment. This is because the trial court's focus is narrower on the issue of qualified immunity. Thus, as to many excessive force claims, there is likely to be sufficient circumscribed factual information, as in this case, to show that qualified immunity was justified. If that is not the situation, then either the jury can render a verdict on that issue separately, based on clear instructions, or, more appropriately, the judge can make

a legal determination after trial.[9]

The Ninth Circuit's 'identical-issues' ruling in this case creates a major exception to the availability of qualified immunity in many, if not most, excessive force cases involving some material dispute of facts. Combining both issues together means that qualified immunity will not be considered at any early stage in the litigation and separately from liability. Moreover, applying the same "reasonableness standard" means that the finding of immunity will likely parallel the finding of liability, especially after trial when a trial judge would likely have to show much courage to render judgment on qualified immunity grounds in favor of the officer after a jury verdict on liability in favor of the plaintiff. Thus, qualified immunity will either be unavailable in all by a few rare cases or be irrelevant if no liability is found on the merits. Such results will defeat the reason for the immunity and will render the doctrine obsolete in excessive force cases.

This Court in *Anderson v. Creighton* expressly rejected that approach of creating an exception to the general rule as to when qualified immunity applies.[10] The Court refused to create an exception because, "Harlow clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board.'" *Id.* at 645. As in *Anderson*, the Ninth Circuit's approach of effectively creating an exception in excessive force cases, by requiring that any qualified immunity

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[9] If, however, as a matter of law, a court cannot find qualified immunity prior to trial and if that issue is appealed and the appellate court affirms that finding during an interlocutory appeal, then the question is still appropriate for the jury, apart from the issue of the existence of a constitutional violation and liability. Therefore, a jury may justifiably find that a law enforcement officer, who violates a plaintiff's constitutional right by using excessive force, is entitled to qualified immunity, whenever the jury assesses conflicting evidence and determines that the officer, in good faith, reasonably believed his or her actions were justified in self-defense or in defense of others. *See Snyder v. Trapagnier*, 142 F.3d 791 (5th Cir. 1998), cert. granted, 525 U.S. 1098 (1999), cert. dismissed, 526 U.S. 1083 (1999).

[10] The Court rejected the plaintiffs' assertion that "no immunity should be provided to police officers who conduct unlawful warrantless searches of innocent third parties' homes in search of fugitives." 483 U.S. at 644.

determination await trial and that such determination parallel the decision or verdict on liability, as the Court has stated, "would introduce into qualified immunity analysis a complexity rivaling that which we found sufficiently daunting to deter us from tailoring the doctrine to the nature of the officials' duties or the rights allegedly violated." *Id. See also Graham v. Connor*, 490 U.S. 386, 394 (1989), where this Court rejected the notion that "all excessive force claims brought under § 1983 are governed by a single generic standard." *Id.* at 393.

In addition, under the Ninth's Circuit's 'excessive-force' exception, a pretrial determination on qualified immunity could occur *only* under two circumstances, *either* when a reported appellate or even trial court decision in that jurisdiction or circuit considered the same or very similar set of facts—clearly establishing the law, *or* if the case was so obviously frivolous with no dispute as to the material facts, which would still be rare under the Ninth Circuit's expansive decision. The *Anderson* court specifically rejected this type of approach:

> [W]e have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various ... duties or the precise character of the particular rights alleged to have been violated. An immunity that has an many variants as there are modes of official action and types of rights would not give conscientious officials that assurance or protection that it is the object of the doctrine to provide.

Ibid. at 643.

Here, without a reversal of the Ninth Circuit's decision, this *new exception* will severely limit the availability of qualified immunity in lawsuits claiming excessive force, and the purpose that qualified immunity serves in many, if not most, excessive-use-of-force cases will have been thwarted.

II. The "objective reasonableness" component of the judicial inquiry as to the lawfulness of an officer's

II. The "objective reasonableness" component of the judicial inquiry as to the lawfulness of an officer's conduct under the Fourth Amendment, is not the same as the objective "reasonableness-of-officer's-belief" component of the inquiry as to the officer's qualified immunity. If both were the same, the consequences would be that qualified immunity would rarely be applicable in excessive force cases but would instead become a futile and unavailing doctrine.

The application of two different 'reasonableness' standards causes no inconsistency violative of the Fourth Amendment. In two decisions, *Malley v. Briggs*, 475 U.S. 335 (1986) and *Anderson*, this Court held that police officers can assert qualified immunity as a defense if their conduct was objectively reasonable, even if the officers acted unreasonably and in violation of a suspect's Fourth Amendment rights. *Anderson* rejected the notion that a court cannot extend qualified immunity to police officers alleged to have conducted an unreasonable search or seizure. That notion "is foreclosed by the fact that we have previously extended qualified immunity to officials who were alleged to have violated the Fourth Amendment." *Anderson*, 483 U.S. at 643. (citations omitted) Police officers are entitled to qualified immunity when, "their decision was reasonable, even if mistaken." *Hunter v. Bryant*, 502 U.S. at 229 (1991). Therefore, a police officer's conduct may be unreasonable within the meaning of the Fourth Amendment but nevertheless objectively reasonable for qualified immunity purposes under § 1983 claims.[11]

Flowing from these and other decisions by this Court, six United States courts of appeals—the First, Second, Fourth, Fifth, Eighth, and Eleventh Circuits—apply the rule that the force used by an officer may have been so excessive as to have violated the Fourth Amendment but that the officer can still protected from further suit by qualified immunity.[12] Thus, this Court's precedents

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[11] The impetus behind qualified immunity is to supply government officials with the ability to "reasonably anticipate when their conduct may give rise to liability for damages." *Anderson*, 107 S.Ct. at 3042 (1987).

[12] *See McNair v. Coffey*, 2000 WL 1801253 (7th Cir. 2000) which lists the

(as refined by decisions emanating from circuit courts) have developed one overriding standard, as follows: A trial court or appellate court may find that a law enforcement officer, who may have violated or did violate the plaintiff's constitutional rights by using excessive force, is entitled to qualified immunity when the judge (or, as necessary a jury) determines that the officer reasonably believed his or her actions were lawful and justified, in light of the information possessed at the time. If, by chance, there is clearly established law applying to and prohibiting the specific force in question, which should have been known by and otherwise been apparent to a reasonable police officer, then the officer's a belief as to the force used was unreasonable, thereby precluding qualified immunity. "[I]t is for the district court to determine whether the unlawfulness of [officer's] conduct should have been apparent to [the officer] at the time." *Finnegan v. Fountain*, 915 F.2d 817 , 824 (2nd Cir. 1990).

The only possible overlap between these two reasonable tests, the one pertaining to immunity and the other to liability, is the emphasis on the word "reasonableness," and the need to consider the officer's perspective in making both determinations. The problem with the Ninth Circuit's decision is confusion between the concept 'reasonable officer' and the concept of a 'reasonable belief held by an officer'. *Anderson* addressed the confusion arising from the linguistic similarity between the Fourth Amendment's reasonableness standard and the qualified immunity reasonableness standard. It indicated that the terminology used is not the guiding factor and does not mean that the standards are identical. The passage from *Anderson* is instructive:

> Its surface appeal is attributable to the circumstance that the Fourth Amendment's guarantees have been expressed in terms of "unreasonable" searches and seizures. Had an equally serviceable term, such as "undue" searches and seizures been employed, what might be termed the 'reasonably unreasonable' argument against application of Harlow to the Fourth

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seminal decision for each of these circuits, and cases from each circuit are cited in the Petition for cert. , at 13-15, in this case.

> Amendment would not be available--just as it would be available against application of Harlow to the Fifth Amendment if the term 'reasonable process of law' had been employed there. The fact is that, regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable, ...

483 U.S. at 643-645. In *Oliveira v. Mayer*, 23 F.3d 642 (2nd Cir. 1994), the Second Circuit, citing *Anderson*, explained how use of the word 'reasonable' or 'reasonableness' does not convert the qualified immunity and liability standards into an identical one:

> [W]e have been instructed [by *Anderson*] that the objective reasonableness component of the inquiry as to lawfulness is not the same as the objective reasonableness component of the inquiry as to qualified immunity... The result of the distinction between reasonableness as a component of a Fourth Amendment violation and reasonableness as a component of an immunity defense is that an officer is protected in some circumstances ... when he reasonably believes that a reasonably prudent police officer would have acted even though a reasonably prudent police officer would not have acted.

23 F.3d at 648-49. The distinction between the reasonableness standard for qualified immunity and the reasonableness standard for Fourth Amendment violations has also been described to rest on "the less stringent reasonable man standard of the tort action against governmental agents." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1348-1349 (2nd Cir. 1972) (Lumbard, J., concurring), *upon remand*, 403 U.S. 388 (1971). [13]

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[13] The Second Circuit explained that the lesser standard for qualified immunity is appropriate because "officers cannot be expected to predict what federal judges frequently differ among themselves." *Id.* There, the court concluded, at 1349: "It would be contrary to the public interest if federal officers were held

Because police officers work and have to make split second decisions in an environment which includes circumstances that are "tense, uncertain, and rapidly evolving", *Graham v. Connor*, 490 U.S. 386, 397 (1989), they are given substantial latitude in determining whether and what type of force can be used.

> Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

United States v. Cortez, 449 U.S. 411, 418 (1981).

In determining whether an officer acted reasonably for qualified immunity purposes, the issue is whether the officers acted "reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Hunter*, 502 U.S. at 228 (1991). Thus, in deciding that the agents acted reasonably and were entitled to qualified immunity, this Court examined the "facts and circumstances within their knowledge and of which they had reasonably trustworthy information" at the time of the arrest *Id.* at 228.

Although *Graham v. Connor* did not involve a claim of qualified immunity, there, the Court stated, "Similarly, the officer's objective 'good faith'–that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment–may be relevant to the availability of the qualified immunity defense to monetary liability under [section] 1983." 490 U.S. at 399, n.12.

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to a probable cause standard as in many cases they would fail to act for fear of guessing wrong. Consequently the law ought to, and does, protect government agents if they act in good faith and with a reasonable belief in the validity of the arrest and search."

Qualified immunity protects police officers who make "mere mistakes in judgment, whether the mistake is one of fact or one of law.". *Karnes v. Skrutski*, 62 F.3d 485, 498 (3rd Cir. 1995). "[Q]ualified immunity is available as a defense to ... an objectively unreasonable use of excessive force under the Fourth Amendment." *Brown v. Glossip*, 878 F.2d 871, 873-874 (5th Cir. 1989). Thus, even if a plaintiff proves excessive force, to overcome the defendant's immunity defense, the plaintiff must still allege facts sufficient to show that the defendant did not act in objective good faith .... *Id.* at 874 *See Quezada v. County of Bernalillo et al.*, 944 F.2nd 710, 718 (10th Cir. 1991).

The Ninth Circuit and other circuits have chosen to follow a different path in this case, oblivious to the precedents of this Court. That court's decision in this case clearly mischaracterizes the standard for qualified immunity. In an effort to distinguish *Anderson*, the Ninth Circuit inaccurately states that the Supreme Court's analysis in *Anderson* addressed only the first prong, the 'clearly-established' element, not the second element of 'objective reasonableness'. 194 F.3d at 969. Clearly, the language in *Anderson* was not so limited, as clear from the language already quoted from *Anderson* in this brief, *supra*.[14] *Anderson* and its progeny leave no doubt that there is a difference between a good faith "reasonable" belief, supported by the circumstances, and the reasonableness of the action taken under the Fourth Amendment. Even without these Supreme Court precedents, common sense would dictate that result.

Contrary to the opinion below, the only difference in applying the standard for qualified immunity and the one for liability is *not* the first prong, i.e. whether the law was clearly established. (If the law was not clearly established, then the standards for both qualified immunity and liability are identical, according to the Ninth Circuit.) The Ninth Circuit's decision

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[14] For example, the following language in the Ninth Circuit's opinion confirms mischaracterizes the standard: "An officer cannot have an objectively reasonable belief that the force used was necessary (entitling the officer to qualified immunity) when no reasonable officer could have believed that the forced used was necessary (establishing a Fourth Amendment violation)." *Katz*, 194 F.3d at 969.

disregards the reality that in excessive force cases, including those arising out of arrests, detentions, or the use of deadly force, there is often no other case with the same set of facts and thus directly on point concerning the amount of force used, as contrasted with a special type of force on which there are specific court decisions. Thus, a general proscription in law against use of excessive force does not equate with clearly established law of which the officer should have been aware.

The Second Circuit in *Finnegan v. Fountain*, 915 F.2d 814, 823 (2d Cir. 1990) analysis exposes the fallacy of this approach:

> Although it can be said that the right of an individual not to be subjected to excessive force is "clearly established" in the convention sense, the Supreme Court in *Anderson v. Creighton*, (citation omitted), has cautioned against framing what is a "clearly established right at this level of generality: ... In other words, to say that the use of constitutionally excessive force violates a clearly established right, according to the Supreme Court, begs the open question whether the particular decree of force under the particular circumstances was excessive. ... Rather, *Anderson* advises that a middle approach is to be taken: the facts and circumstances of each case must be examined ....

In its wisdom, the Court in *Anderson* provides the clarity needed in making this determination, as follows:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: The contours of the right [alleged to have been violated] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful (citation omitted); but it is to say that

> in the light of pre-existing law the unlawfulness must be apparent. (citation omitted).

Anderson, 483 U.S. at 640.

This Court reaffirmed *Anderson* in *Wilson v. Layne*, 119 S.Ct. 1692 (1999). The question in *Wilson*, "whether a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed, ..." *Id.* at 1700, is basically the same question in this case, even if posed differently to reflect the different factual context. A Fourth Circuit decision involving a claim of excessive force framed the issue, as follows. "[T]he question is whether, confronted with the facts of this case, reasonable police officers should have known that clearly established constitutional law prohibited the methods used in the search [involving the use of force]. *Taft v. Vines*, 83 F.3d 681, 684 (4th Cir. 1996).[15]

Applying *Wilson*, the key question in this case, which the district court and then the appellate court should have asked is, as follows: Whether Petitioner could have reasonably believed that the use of force was lawful to restrain and remove the Respondent or otherwise carry out his arrest, in order to prevent a public disturbance, based on the information the officer possessed at the time? Alternatively, to state it differently—paraphrasing *Taft:* Whether, confronted with the facts of this case, reasonable military police officers should have known that clearly established constitutional law prohibited the methods used in arresting the Respondent, removing him, and placing him into a van.

While there may be some narrow disputes of fact in this case, there is sufficient evidence, including the videotapes of the incident—a rarity in these cases—, that, as a matter of law, a district court should have dismissed the Petitioner from the

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[15] In *Taft*, the court upheld a finding of qualified immunity, even though the force used in *Taft* was allegedly a shotgun held within six to seven inches of the mistaken suspect's head, force that is obviously qualitatively different than the force used in the instant case.

lawsuit. If there were ever a case justifying the application of qualified immunity, it is this one. We urge the Court to rule that it was not unreasonable for a military officer to have believed that the force used to arrest the Respondent, to quickly remove the him from the Presidio ceremony, and to place him a van out of sight, to prevent a public protest or stop a disturbance of an important event, was lawful. In the absence of a clearly-established prohibition on the methods used in this case for such a public event, the Petitioner is deemed to have acted under a reasonable belief that the his actions were consistent with the Fourth Amendment. Thus, the Petitioner should have been granted qualified immunity by the district court.

III. As matter of law, an officer should be granted qualified immunity when the key facts show a de-minimis or minimal amount of force used against a plaintiff, combined with a minor or non-existent injury, as long as the essential material facts supporting a finding of qualified immunity are uncontroverted. Petitioner's use of force in arresting and removing Respondent, without causing any injury to him or any pain, was so minimal, even under Respondent's more dramatic version of events, that it clearly did not exceed the amount of force permitted by the Fourth Amendment and therefore summary judgment on qualified immunity was clearly warranted on that ground alone.

Not every impairment or government restraint on liberty amounts to a constitutional violation. "On a quantitative level, we have, to be sure, acknowledged that not every modest impairment of individual liberty amounts to a deprivation raising constitutional concerns. (citation omitted)" *Albright v. Oliver*, 114 S.Ct. 807, 824 (1994) (Stevens, J., dissenting). In addition, this Court "has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396. "'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), violates the Fourth Amendment." *Graham*, 490 U.S. at 396.

The Eleventh, Fifth, Second, Fifth, Eight, and Eleventh Circuits apply the principle of de minimis or minimal use of force and grant qualified immunity to the defendant officers whenever the force used by a law enforcement officer was minimal and the injuries were minor or non-existent.

In *Nolin v. Isbell*, 207 F.3d 1253 (11th Cir. 2000), the Eleventh Circuit discussed how that circuit applies the principle of de minimis force to qualified immunity questions.

> This Court has explained that when applied in excessive force cases, "qualified immunity applies unless the application of the standard would inevitably lead every reasonable officer in [the position of the defendant officer] to conclude that the force was unlawful." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993), *modified* 14 F.3d 583 (11th Cir. 1994).
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> ...
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> *Post* ... conclud[ed] that in making the highly fact-intensive excessive force inquiry, a court may conclude that an officer retains qualified immunity when the facts show a minimal amount of force combined with a minor or non-existent injury.

207 F.3d at 1256-1257.

In *Nolin*, the court of appeals observed that it had reversed district court denials of qualified immunity for officers in at least three prior cases, relying upon the principle of de minimis force. *Id.* at 1256. It is instructive to turn to the instances of excessive force alleged by the plaintiffs in *Nolin* and these three other cases. In *Nolin*, the plaintiff, who was involved in a fight, claimed that the officer grabbed him from behind the shoulder and wrist, threw him against a van three or four feet away, kneed in the back and pushed his head into the said of the van, searched his groin in an uncomfortable manner, and handcuffed him, causing bruises to the plaintiff in several places, although they quickly disappeared and no medical treatment was sought. The court stated, "Certainly, these circumstances would not 'inevitably lead' a reasonable

officer in the officers' position to conclude that the force used to apply the handcuffs was unlawful." *Id.*

In the three other excessive force cases cited in *Nolin* on this point, the Eleventh Circuit ruled in favor of qualified immunity for law enforcement officers. In *Post*, the officer pushed the plaintiff against the wall and applied a choke hold, even though the plaintiff did not resist; "reasonable doubt existed and still exists, on whether this amount of unnecessary force was unlawful." 7 F.3d at 1559-60 (citations omitted). In *Gold v. City of Miami*, 121 F.3d 1442 (11th Cir. 1997), the plaintiff, arrested for disorderly conduct, was placed in handcuffs and then complained that the officer had applied them too tightly and had refused to loosen them, causing the plaintiff pain but only minor skin abrasions for which no medical treatment was sought; "[t]he minor nature of this injury reflects that minimal force was used to apply the handcuffs. Certainly these circumstances would not 'inevitably lead' a reasonable officer in the officers' position to conclude that the force used to apply the handcuffs was unlawful." *Id.* at 1446-1447. In *Jones v. City of Dothan*, 121 F.3d 1456 (11th Cir. 1997), the officer slammed the plaintiff against the wall, kicked his legs apart—causing pain in an arthritic knee, required him to raise his arms above his head—which caused pain due to a prior stroke, and pulled his wallets from his pants. *Id.* at 1460. "While the use of force ... may have been unnecessary, the actual force used and the injury inflicted were both minor in nature. *Id.* at 1460-61.

The Fifth Circuit takes a slightly different approach than the Eleventh Circuit, emphasizing the requirement that there by an injury. In *Williams v. Bramer*, 180 F.3d 699 (5th Cir. 1999), the plaintiff alleged that the officers violated his rights by choking him while conducting a search of his mouth to find drugs and then choking him again when he complained about the first choking. While reversing a district court finding of qualified immunity on the second choking, the court upheld the qualified immunity on the first choking, because of a lack of injury. The court stated

> [W]e do require a plaintiff asserting an excessive force claim to have "suffered at least some form of injury" (citation omitted). Furthermore, we have

> shaped our analysis so that we do not permit a cause of action for every contact between a citizen and a police officer: "In just about every conceivable situation, some amount of force or contact would be too nominal to constitute a constitutional violation. When the force used is insufficient to satisfy the legal standard necessary for recovery, the amount of force is de minimis for constitutional purposes." (citation omitted). In determining whether an injury caused by excessive force is more than de minimis, we look to the context in which that force was deployed. ...

180 F.3d at 703-04.

In another minimal force case, *Lennon v. Miller*, 66 F.3d 416 (2d Cir. 1995), the defendant officer asked the plaintiff to get out of her car but she remained in the driver's seat and refused to budge. The officer arrested her, pulled her hand off the ignition, placed his arm around her neck, shoulder, right arm, and forcibly removed her from the car. The only injury was to the plaintiff's right wrist, for which she was treated at a hospital (however, there was no information pled as to the extent of her injuries). The Second Circuit affirmed a summary judgment for the officer on qualified immunity grounds, based on the amount of force use:

> [N]o rational jury could have found that the force used was so excessive that no reasonable officer would have made the same choice. ... The intrusion on Mrs. Lennon's Fourth Amendment rights, if any, was extremely limited. It was objectively reasonable for [the officer] to believe that in pulling plaintiff from the car to effect her arrest, he was not infringing on her Fourth Amendment rights. Under the circumstances described above, no jury could find that it was objectively unreasonable for the officers to believe that the forced used to remove Mrs. Lennon from the car was not excessive.

66 F.3d at 426.

In *Curd v. City Court of Judsonia, Arkansas*, 141 F.3d 839 (1998), the plaintiff alleged excessive force because the police chief seized her arm, spun her around and told her to get into the police car and also because she was fingerprinted three separate times. The district granted summary judgment for the officers on qualified immunity grounds, and the appeals court affirmed:

> ... Even if seizing Curd's arm and turning her body was unnecessary to effect the arrest, we cannot conclude that this limited amount of force was objectively unreasonable. [footnote omitted] See, e.g., *Joos v. Ratliff*, 97 F.3d 1125, 1126 (8th Cir. 1996) (per curiam) ("de minimis" amount of force in effecting an arrest would be insufficient to create constitutional issue). ... See also *Haberthur v. City of Raymore*, 119 F.3d 720, 723 (8th Cir. 1997) ("Section 1983 is intended to remedy egregious conduct, and not every assault or battery ... will create liability under it.") Our conclusion is bolstered by the fact that Curd does not allege, and there is no evidence, that she was injured or experienced physical pain as a result of Hale's actions. (footnote omitted.) The conduct of Chief Hale in arresting Curd was not so egregious that we can find a constitutional violation.

141 F.3d at 841-42.

The approaches taken in these decisions is certainly justified under *Anderson* to promote the public interest underpinning qualified immunity and to clear the courts of what are truly frivolous lawsuits under the Fourth Amendment.

Turning to the case at hand, taking the plaintiff's allegations as true and with the evidence on the videotape, the force involved in removing the Respondent and in placing him in the van was nominal and minimal, as supported by a lack of any injury. Also, the force used was of the type that police officers could reasonably expect to use to remove an individual quickly from a crowd to prevent a public disturbance. Under the any of these standards

established by the Second, Fifth, Eighth, and Eleventh Circuits, qualified immunity should have been granted for the Petitioner by way of summary judgment as a matter of law.

The Eleventh and Second Circuit formulations are especially relevant to the instant case. *First*, the circumstances here would not 'inevitably lead' a reasonable officer in Petitioner's position to conclude that the force used to remove Respondent and push him into the van was unlawful, the Eleventh Circuit's test.*Second,* no rational jury could have found that the force used by Petitioner was *so* excessive that no reasonable officer would have made the same choice, the Second Circuit's standard.

While the Fifth and Eighth Circuit's cases cited did grant qualified immunity, they predicated their decisions on the definite absence of any constitutional violation and thus the lack of liability. This is consistent, because if there is no constitutional violation, then it invariably follows that the grounds for qualified immunity also exist. Applied to the instant case, the standards from those circuits would justify qualify immunity in this case. *First*, here, the Respondent did not suffer any form of injury, the Fifth Circuit's requirement. *Second,* the limited force in arresting and removing the Respondent, combined with no injury, was not so egregious that the court of appeals could find a constitutional violation, the Eight Circuit's formulation.

Application of any of these standards would serve the public purpose of immunizing a police officer from lawsuit at an early stage, not during or after trial. *Amicus curiae* respectfully suggests that the Court adopt either the Eleventh Circuit's 'inevitably lead ...' standard or the Second's Circuit's 'no rational jury ...' formulation. The absence or presence of a minor injury is certainly very relevant, but should not be determinative.

The Ninth Circuit's opinion disregarded the amount of force involved and the lack of any injury to Katz. The Ninth Circuit invoked the list of factors making up the analysis required by *Graham* in determining whether the force was objectively reasonable for qualified immunity purposes, expanding *Graham* beyond its scope, which was whether the force used violated the

Fourth Amendment.[16] *Amicus curiae* has been unable to find any specific holding by this Court incorporating the *Graham* standards into the qualified immunity analysis in excessive force cases, notwithstanding the court of appeals' reliance upon *Graham*.

CONCLUSION

Following this Court's past precedents, an officer who is a defendant in a *Bivens* or § 1983 action should be protected by qualified immunity at the earliest stage of a lawsuit, whenever the officer reasonably believes that at the time some apparent force was lawfully necessary to effectuate an arrest, restrain an individual, or take some other related action, *notwithstanding* any possibility that there could be a subsequent determination (or even an actual determination) of an unconstitutionally excessive use of force and liability. Alternatively, whenever it is undisputed, for the most part, that the force used in effectuating an arrest or restraining an individual is minimal, combined with the lack of more than a very minor injury, qualified immunity should apply as a matter of law, even if it clearly appears that the force was excessive and unnecessary.

Therefore, *amicus curiae* respectfully requests that the Court reverse the judgment of the U.S. Court of Appeals for the Ninth Circuit and find that, as a matter of law, the Petitioner is entitled to qualified immunity. The precedents of this Court and the public interests on which they are based require no less.

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[16] The Ninth Circuit relied heavily on *Liston v. County of Riverside*, 120 F.3d 965 (9th Cir. 1997), where it applied the *Graham* three part analysis. That case is readily distinguishable from the instance one, and it is inconceivable that the facts of that case would have put a military police officer on apparent notice that the force used in this case was unlawful. The force in *Liston* was very different qualitatively and quantitatively than the force here. There, the officers pointed guns at and commanded plaintiff Jimmy Liston to both get down and raise his hands—contradictory commands that led him to not move, which then led to an officer grabbing him from behind and throwing him down on the floor and injuring him. One officer placed a foot on his back and another officer stood on his hands. At one point, a gun was stuck at the temple. In addition, Liston's suffered injury. *Id.* at 971.

Respectfully submitted this eight day of January 2001,

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